85-1156

NO. 85-

Supreme Court, U.S.
FILED
DEC 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY SPALLATO, Administrator of the Estate of SONJA M. SPALLATO, Deceased,

Plaintiff-Petitioner

v.

UNITED STATES OF AMERICA,

Defendant-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
No. 84-2996

AMBROSE & CUSHING, P.C.
7 South Dearborn Street
Chicago, Illinois 60603
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Attorneys for Petitioner

JOHN C. AMBROSE,
Of Counsel

December 30, 1985

QUESTION PRESENTED

Whether the trial court clearly erred in reaching its decision that the medical testimony did not establish Guillain-Barre Syndrome which was brought about by the failure, during the bench trial, to consider all of the evidence and required a higher standard of proof than required by State law.

PARTIES TO THE PROCEEDINGS

The following parties appeared in the proceedings in the United States Court of Appeals for the Seventh Circuit:

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Anthony Spallato, Administrator of the Estate of SONJA M. SPALLATO, Deceased

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Appeared for Plaintiff-Appellant, ANTHONY SPALLATO, et al.

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NO. 85-

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY SPALLATO, Administrator of the Estate of SONJA M. SPALLATO, Deceased,

Plaintiff-Petitioner

v.

UNITED STATES OF AMERICA,

Defendant-Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 84-2996

Petitioner, Anthony Spallato, Administrator of the Estate of Sonja M.Spallato, Deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on September 30, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was reported as an unpublished order per circuit rule 35. It is included as Appendix A to this Petition.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was entered on September 30, 1985. The jurisdiction of this court is invoked under 42 U.S.C. Sec. 247(b).

STATEMENT OF THE CASE

Plaintiff, Anthony Spallato, filed suit in the United States District Court for the Northern District of Illinois for personal injury, wrongful death and damages under the National Swine Flu Immunization Program Act of 1976, 42 U.S.C. Section 247(b) and the and the Federal Tort Claims Act, 28 U.S.C. Section 1346(b), et seq. The plaintiff asserted at trial that the untimely death of his wife Sonja M. Spallato, on January 9, 1977 was triggered by Guillain-Barre Syndrome which was caused by her inoculation with the swine flu vaccine on October 28, 1976.

The Plaintiff's, decedent, 37 year old Sonja Spallato was in apparent good health in 1976 when the Defendant instituted the National Swine Flu Immunization Program. Although a diabetic since childhood, she carefully monitored

her diet, medication and exercise regime. (Spallato p. 3)(9-4-84) Her father, Dr. Lovkam, was confident that Sonja's diabetes was under control because her physician always gave him good reports on her condition. (Lokvam p. 37)(9-4-84) Every three or four months Sonja was examined by Dr. Colwell, a diabetic specialist who was her personal physician for many years. (Spallato p. 11)(9-4-84)

Sonja had married Anthony Spallato in 1967 and they shared a close relationship throughout those nine years. (Spallato p. 3)(9-4-84) Frequently they traveled, played golf, hiked and enjoyed numerous social activities. (Spallato p. 4)(9-4-84) Both Anthony and Sonja were teachers. She was employed as a speech therapist with the Evanston School District at the elementary level. Anthony described his wife as an active, healthy, energetic woman who was

dedicated to her profession and equally attentive to her home life. (Spallato p. 5,9,6)(9-4-84) Aside from her many athletic pursuits she had a special interest in ballet and regularly attended dance classes.

On October 28, 1976, Sonja received a swine flu vaccination (bivalent) at the Levy Senior Citizen's Center in Evanston, Illinois. She was concerned about the influenza epidemic and wanted to protect herself against the flu. (Spallato p. 13) (9-4-84)

In late November, (about four weeks after the inoculation) Sonja told Anthony that her legs were bothering her. (Spallato p. 13, 14)(9-4-84) For instance, her habit of climbing the stairs to their third floor apartment now became a hardship. (Spallato p. 8)(9-4-84) Somehow her legs now prevented her from ambulating normally and

(Spallato p. 13, 14)(9-4-84) Sonja began using the elevator service. (Spallato p. 15)(9-4-84)

In time, Sonja found it difficult to even grasp onto a cup of coffee. (Spallato p. 16)(9-4-84) When guests came to visit, Anthony found that he would have to carry out the tray of refreshments. Soon, he began to do all the shopping himself and tended to other household chores. (Spallato p. 18)(9-4-84)

Anthony began to notice certain other changes. When Sonja had to climb any stairs she would pull herself up by holding onto the bannister. When she walked, Sonja would usually lean up against things for support. To raise herself from a sitting position, she would grasp onto a chair. (Spallato p.22)(9-4-84) All the while Anthony waited for her to complain of pain or

something, but she never did. (Spallato p. 19, 24)(9-4-84)

In early December, Sonja informed Anthony of her decision to discontinue the ballet classes. She found that she could not execute the routines or hold the positions. (Spallato p.17) (9-4-84)

During this time Sonja told her father of the increasing difficulties she was experiencing with her legs and hips. (Lokvam p. 38)(9-4-84) As Sonja was not a complainer by nature, Dr. Lovkam became concerned when he heard of this weakness. (Lokvam p. 39)(9-4-84) Seeing how she looked, (face drawn and sallow) and felt over the holidays, he insisted that she contact her physician. (Lokvam p.39) (9-4-84) When Sonja finally contacted Dr. Colwell, however, she could not get an appointment for two weeks. (Lokvam p.39, Spallato p. 24)(9-4-84)

On January 8, 1977 Sonja's condition worsened. She complained of pain in both hips and Anthony called Dr. Colwell. (Spallato p. 25)(9-4-84) That night she slept very little. The next morning Anthony dressed Sonja and carried her into Evanston Hospital. (Spallato p.27) (9-4-84)

A few hours later, while in the hospital bed, Sonja fainted away and all attempts to revive her failed. (Spallato p.28) (9-4-84) The cause of death was reported as acute myocarditis.

Sonja had not been examined neurologically in the course of her short term in the hospital. Although an autopsy was performed, it did not include an examination of her brain, spinal cord or peripheral nerves. Dr. and Mrs. Lovkam were not aware of the fact that Sonja had received the swine flu until sometime after the funeral. (Lokvam p.36)

(9-4-84) The condition of ill-being from which Sonja suffered from November 1976 until the time of her death was never diagnosed.

Dr. Neil Allen, the Plaintiff's neurologist, testified to his experience in diagnosing and treating at least thirty to fifty cases of GBS. Although a neurological examination is the best method of arriving at a diagnosis, Dr. Allen emphasized that in certain settings it is necessary to rely upon the information provided by the patient and by observers. (e.g. curbside consults) (Allen p. 12)(9-4-84)

In this instance, the information supplied by Sonja's husband and both of her parents was strong evidence to consider a diagnosis of GBS in light of the additiional information regarding the swine flu shot Sonja received prior to

the onset of her problems. (Allen, p. 13, 91)(9-4-84)

According to Dr. Allen, who relied on the NINCDS criteria, the unique feature of GBS which distinguishes it from other neuropathies is the progressive motor weakness without a lot of sensory symptoms. (Allen p. 63, 64)(9-4-84) In addition, the symmetry of the weakness (both legs and both arms) lends further support to the correctness of the diagnosis. (Allen p. 70,71)(9-4-84)

When presented with the picture of a patient who experiences progressive weakness without strong sensory symptoms, with symmetry of the weakness, and who four to eight weeks prior to the onset of such features received a swine flu vaccination, Dr. Allen concluded that the best diagnosis would be GBS. (Allen. p. 24)(9-4-84)

Dr. Lichtenstein, the Defendant's neurologist also diagnosed at least fifty cases of GBS, but treated very few of these patients. (Lichenstein p. 4,21) (9-6-84) He agreed that the outstanding characteristic of GBS is the weakness of the lower extremities. It can range from mild weakness to complete paralysis. (Lovkam p. p. 4)(9-4-84)

In his testimony, Dr. Lichtenstein set out the known causes of GBS. It generally occurs following upper respiratory infections, pulmonary infections and GI tract infections. (Lichtenstein p. 9)(9-6-84) It has also complicated surgical operations and occurs with Hodgkin's disease. Finally, GBS has been associated with vaccinations, "the most notorious was, of course, the swine flu vaccination of several years ago." (Lichtenstein p.6) (9-6-84)

When the defense presented Dr. Lichtenstein with a hypothetical portraying Sonja's condition, he found it was possible that she had GBS. But, because of her diabetes, he concluded that she more likely had diabetic neuritis. (Lichtenstein p.11,15,16) (9-6-84)

According to Dr. Lichtenstein, in order to diagnose diabetic neuritis, you only look to verify the underlying disease of diabetes mellitus. But, in diagnosing GBS, you must diagnose the syndrome itself. (Lichtenstein p. 8)(9-6-84)

On cross-examination, Dr. Lichtenstein testified that, as a rule, diabetics experience lots of sensory symptoms, including pain, loss of touch, numbness, burning and itching. (Lichtenstein p. 34)(9-6-84) He emphasized the pain. (Lichtenstein p. 37)(9-6-84) When Dr. Lichtenstein was referred to his earlier

opinion that Sonja's condition was more likely diabetic in origin, he corrected himself by stating "But, I said, I also said it could or might be a Guillain-Barre." (Lichtenstein p. 37)(9-6-84)

Dr. Lichtenstein also admitted that the swine flu shot is a reasonable cause of GBS when onset of weakness appears by the fourth week. (Lichtenstein p. 38)(9-6-84) But he chose to ignore this evidence because of Sonja's diabetes which he characterized as a "heavy illness." (Lichtenstein p. 38)(9-6-84)

In rebuttal, Dr. Allen pointed out Dr. Lichtenstein's misapprehension of Sonja's complaints of weakness. She did not exhibit or complain of tiredness which is a diffuse feeling of malaise associated with an alteration of the mental state. Instead, her complaints and manifestations were of muscle weakness which is the inability to move about normally

without some assistance. (Allen, rebuttal p. 11)(9-11-84)

Dr. Allen also stressed that the cardinal feature of GBS is motor or muscle weakness, whereas the cardinal feature of diabetic neuropathy is sensory alteration. (Allen, rebuttal p.13) (9-11-84) He also noted that Dr. Lesch referred to the medical records where it was indicated that Sonja "had a bilateral hip pain with stiffness on admission to the hospital." (Allen rebuttal p.32) (9-11-84) After reading this notation, Dr. Lesch commented that "Whether this woman had some other antecedent illness or not, I don't know". (Allen rebuttal p. 32)(9-11-84) According to Dr. Allen, bilateral hip pain is part and parcel of the root or radicular involvement in GBS (Allen rebuttal p. 33)(9-11-84) Considering the swine flu vaccine, the clear progression to GBS, Dr. Allen concluded

that this condition aggravated, promoted and influenced the death of Sonja Spallato. (Allen rebuttal p.44) (9-11-84)

At the close of trial, the court ruled in favor of the government. Although the judge indicated that Sonja may have had GBS, he considered it equally probable that she did not have GBS.

On appeal, plaintiff argued that the trial court's findings on the issue of Sonja's post-vaccinal condition were erroneous and contrary to the manifest weight of the evidence. In its Rule 35 order, rendered without benefit of argument, the appeals court affirmed the district court. The opinion glossed over plaintiff's major contentions by relying on the fact that no neurological or laboratory examination was performed on Sonja Spallato. Both in the district court and in the Court of Appeals the

fault of her post-vaccinal sufferings was summarily attributed to her diabetic condition.

REASONS FOR GRANTING THE WRIT

This Court should review the decision of the Court of Appeals which upheld the district judge's findings in this swine flu litigation without meaningfully addressing the critical issue of Sonja M. Spallato's post-vaccinal condition which plaintiff amptly demonstrated to be GBS contracted as a result of the vaccine.

Both the letter and the spirit of the Swine Flu Act 42 U.S.C. sec. 1346(b) suggest just compensation for the suffering of individuals harmed by the government sponsored vaccine program of 1976. As has been shown, the plight of diabetic persons who have contracted Guillain-Barre Syndrome (GBS) as a result of the swine flu innoculation requires special attention for the reason that GBS is manifested by symptoms similar -- but not identical -- to diabetic neuropathy.

See, generally Heyman v. United States, 506 F.Supp. 1145 (S.D. Fla. 1981).

This was just such a case. Review by this Court is necessary to remedy the failings of the Court of Appeals to address itself to these concerns which plaintiff asserted were erroneously decided at trial.

At the outset, the government's witness failed to reasonably substantiate the alternate diagnosis of diabetic neuropathy which he posited. Dr. Lichtenstein ignored the evidence and based his wavering opinion solely on the fact that Sonja M. Spallato was a diabetic. In accepting this conclusion, the trial judge likewise gave overwhelming weight to this single factor and ignored both the credible testimony of Sonja's family and medical knowledge.

In an unpublished order decided without benefit of argument, the Court of Appeals

glossed over plaintiff's argument and obscured the issue by also pointing to Sonja's pre-existing diabetes. But, the fact that Sonja died before a neurological examination was performed, or that she was a diabetic or that certain organs were effected by this disease does not justify the indifferent attitude concerning her post-vaccinal condition displayed by the government's witness, the trial court and the reviewing court.

Review is also necessary because the Court of Appeals was not convinced that certain medical testimony excluded at trial would have been highly probative. In this regard, the offer of proof demonstrates that Sonja Spallato's treating physician found her to be a healthy, active woman with no sensory problems. Such evidence would have clearly rebutted the government's alternative diagnosis of diabetic

neuropathy which is characterized by its slowly evolving processes. The rapid progression of Sonja's ailments, on the other hand, was highly indicative of GBS. Thus, the wrongful ommission of this testimony proved substantially prejudical to the plaintiff.

The Court of Appeals opined that the exclusion of the testimony of the treating physician should not have been excluded, based upon Rule 403. But surprisingly, then turned around and said that the excluded testimony would in any event was not probative and the exclusion did not seriously prejudice the plaintiff's case. It is obvious that the critical turning point in the decision of the case was whether her condition of ill being was caused by her pre-existing diabetic condition or related to the swine flu inoculation. The trial judge in excluding the evidence under 403 not

only committed error, but failed as a finder of fact to weigh all of the evidence in this most critical aspect of the case.

Review is necessary because the trial judge required a higher standard proof than was necessary when it sought to seek absolute certainty from the plaintiff's medical expert. The opinion dramatizes this, but came to the erroneous conclusion when it referred to the questioning by the trial judge, to-wit:

> "What I want to do is get your opinion, based upon a reasonable degree of medical certainty, as the mechanism that brought about the death of Mrs. Spallato."

As can be seen by the Court opinion, both the trial judge and the Court of Appeals erroneously found that the proper standard for medical evidence was used when the words "based upon a reasonable degree of medical certainty" was used in the question and underlined in the

opinion. However, the significance of the question is in the following clause where the trial judge, during his unwarranted examination of the expert, sought "the mechanism that brought about the death of Mrs. Spallato." Obviously, the government attorney did not seek such an inappropriate answer by failing to ask such a question, but more than that, the trial judge in dealing with a medical syndrome, sought absolute certainty which, of course, is beyond the abilities of an expert and beyond the standard of proof as required in the State of Illinois.

CONCLUSION

For the reasons stated above, petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings.

Respectfully submitted,

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Attorneys for Petitioner

JOHN C. AMBROSE
Of Counsel

A P P E N D I X

JUDGMENT - WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 30, 1985

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. KENNETH F. RIPPLE, circuit Judge

ANTHONY SPALLATO, Administrator cf the Estate SONJA M. SPALLATO, Deceased, Plaintiff-Appellant,	)Appeal from the)United States)District Court)for the Northern)District of)Illinois, Eastern
No. 84-2996 vs.	)Division.)No. 80 C 1796)
UNITED STATES OF AMERICA, Defendant-Appellee.	)John F. Grady,)Judge.)

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
SUBMITTED AUGUST 28, 1985*
September 30, 1985

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. KENNETH F. RIPPLE, circuit Judge

ANTHONY SPALLATO, Administrator of the Estate SONJA M. SPALLATO, Deceased, Plaintiff-Appellant,	)Appeal from the)United States)District Court)for the Northern)District of)Illinois, Eastern)Division.
No. 84-2996 vs.	)No. 80 C 1796)
UNITED STATES OF AMERICA, Defendant-Appellee.	)John F. Grady,)Judge.

O R D E R

Plaintiff, Anthony Spallato, filed suit in the Northern District of Illinois, under the Federal Tort Claims Act, 28

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

U.S.C. §§ 1346(b), 2671, asserting that the sudden death of his wife, Sonja Spallato, On January 9, 1977, was the result of Guillain-Barre Syndrome caused by her inoculation with swine flu vaccine on October 28, 1976. After a bench trial the district court found for the government. Plaintiff appeals. We affirm.

Plaintiff contends that the district court erred in excluding testimony from his expert witness, Dr. Allen, concerning a telephone conversation with Ms. Spallato's treating physician. Dr. Allen's testimony was to be offered in rebuttal, to indicate that Ms. Spallato's diabetes was under control, but was excluded under Rule 403, Fed. R. Evid., because of unfair surprise to the government. Two months earlier, the district court had ruled that Dr. Allen would not be allowed to testify to any basis for his opinion that was not given at his deposition, because the doctor had

stated, at the time, that he was not acquainted with the medical record. Plaintiff's offer of proof indicated that Dr. Allen, in rebuttal, was simply going to use the treating physician's statements that Ms. Spallato's diabetic condition did not contribute to her death to "support conclusively" his opinion of the "causal connection between the swine flu vaccination, the subsequent condition of GBS and her death." However, Dr. Allen did testify to his belief that diabetes was not the cause of Ms. Spallato's death, and to the mechanisms by which Guillain-Barre Syndrome was. The offer of proof indicates that Ms. Spallato's former treating physician had based his conclusion, in turn, largely on the fact that she was healthy, active, and had no clear-cut sensory problems. However, an autopsy revealed that Ms. Spallato had diabetic glomerulosclerosis,

a scarring of the kidneys that had destroyed 80 to 90 percent of her kidney function, and that her diabetes had caused a disease in the blood vessels of her retina. In light of the other evidence presented, we are not convinced that Dr. Allen's excluded testimony would have been highly probative, and its omission did not seriously prejudice plaintiff's case. While unfair surprise is not an appropriate basis for exclusion of evidence under Rule 403, see O'Rourke v. Eastern Air Lines, 730 F.2d 842, 855 n.21 (2d Cir. 1984); Fed. R. Evid. 403 advisory committee note; 1 J. Weinstein & M. Berger, Weinstein's Evidence at 403-12 to -13 (1982), the decision to exclude expert testimony for failure to comply with discovery is committed to the discretion of the district judge, Gorby v. Schneider Tank Lines, 741 F.2d 1015, 1018-1019 (7th Cir. 1984). We find no abuse of discretion here.

Plaintiff next argues that the district court held him to a higher burden of proof of causation than required by Illinois law, which provides substantive law governing this case, see Smith v. United States, 688 F.2d 476, 479 & n.7 (7th Cir. 1982). However the cases cited by plaintiff, e.g. Dixon v. Industrial Commission, 60 Ill. 2d 126, 324 N.E.2d 393 (1975); National Castings Division of Midland Ross Corporation v. Industrial Commission, 55 Ill. 2d 198, 302 N.E. 2d 330 (1973); Boston v. Illinois Industrial Commission, 125 Ill. App. 3d 789, 466 N.E.2d 625 (4th Dist. 1984), do not suggest a burden of proof less stringent than that employed in the present case. Rather, the cited cases indicate that it is for the trier of fact (there, the Illinois Industrial Commission) not a reviewing court, to resolve conflicts in the medical evidence when necessary to

make a decision. The testimony of a medical expert need not be based on absolute certainty, but only a reasonable degree of medical certainty. Frankenthal v. Grand Trunk Railroad, 120 Ill. App. 3d 409, 419, 458 N.E.2d 530, 538 (1st Dist. 1983). On the other hand, an expert is not allowed to guess or speculate. Id. The transcript of proceedings, and the lucid district court opinion , make clear that the district judge imposed the correct standard of proof. For example, in the course of Dr. Allen's rebuttal testimony the judge inquired: "What I want to do is get your opinion, based upon a reasonable degree of medical certainty, as the mechanism that brought about the death of Mrs. Spallato." [Emphasis supplied]. Consequently, we reject plaintiff's argument.

Finally, plaintiff contends that the district court was wrong in its conclusion that plaintiff had not proved that his wife suffered from Guillain-Barre Syndrome or that the syndrome had caused her death. Such findings are findings of fact, see Grover Hill Grain Co. v. Baughman-Oster Inc., 728 F.2d 784, 794 (6th Cir. 1984), which we review under the "clearly erroneous" standard of Rule 52(a), Fed. R. Civ. P. The evidence presented in this case consisted mainly of testimony of Ms. Spallato's family, concerning her condition in the weeks immediately before her death, and the conflicting conclusions of medical experts. It was undisputed that the diagnosis of Guillain-Barre is a difficult medical task, usually done with the aid of a neurological examination. However, no neurological or laboratory examination was performed on Ms.

Spallato. Dr. Allen agreed that he was basing his diagnosis exclusively on the fact that she had received a swine flu shot and on the testimony of family members. Dr. Allen also agreed that Guillain-Barre and diabetic neuropathy share many common characteristics. It was undisputed that the immediate cause of Ms. Spallato's death was a myocardial infarction. Dr. Lesch testified that diabetics are extremely susceptible to atherosclerosis, which causes ninety-two percent of myocardial infarctions in the country. Heart attacks, he stated, are one of the two leading causes of death in diabetics. The district court found the testimony of the government's medical experts to be more credible than the testimony of Doctor Allen. We conclude that the factual findings of the district court, which are for the most part based on a resolution of conflicts in the

medical evidence and determinations of the credibility of expert witnesses, are not clearly erroneous. See Anderson v. City of Bessemer, 105 S.Ct. 1504, 1512-13 (1985); Jastremski v. United States, 737 F.2d 666, 671 (7th Cir. 1984).

The decision of the district court is AFFIRMED.

NO. 85-

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY SPALLATO, Administrator
of the Estate of Sonja M. Spallato,
Deceased,

Plaintiff-Petitioner

v.

UNITED STATES OF AMERICA,

Defendant-Respondent

NOTICE OF FILING

TO: Anton Valukas, U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60603

Office of the Solicitor General
U.S. Department of Justice
Main Justice Building
Washington, D.C. 20530

PLEASE TAKE NOTICE that on the 30th day of December, 1985, I filed with the Clerk of the United States Supreme Court for presentation to the Judges the Petition For Writ of Certiorari on behalf of Plaintiff-Petitioner, ANTHONY SPALLATO, et al.

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Attorneys for Plaintiff-Petitoiner
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(312) 726-1470

STATE OF ILLINOIS)
) SS.:
COUNTY OF C O O K)

AFFIDAVIT OF MAILING

I, JOHN C. AMBROSE, after first being duly sworn upon oath depose and say:

1. That I am the Attorney of Record for the Plaintiff-Petitioner, ANTHONY SPALLATO, Administrator of the Estate of Sonja M. Spallato, Deceased, in the Petition for Writ of Certiorari;

2. That pursuant to the Rules of Practice of the Supreme Court of the United States, I certify the forty-five (45) copies of the Petition For Writ of Certiorari and Appendix were mailed to the Clerk of the United States Supreme Court on December 30, 1985 to be filed as of December 30, 1985;

3. That pursuant to the Rules of Practice of the Supreme Court of the United States, I certify that three (3) copies of the Petition For Writ of Certiorari and Appendix were mailed to:

(a) Anton Valukas, U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60603

(b) Office of the Solicitor General
U.S. Department of Justice
Main Justice Building
Washington, D.C. 20530

on December 30, 1985 by placing the same in an envelope with the above-mentioned names and addresses and depositing said envelopes in the U.S. Mail in Chicago, Illinois on December 30, 1985.

JOHN C. AMBROSE

SUBSCRIBED and SWORN to
before me this 30th day
of December, 1985.

NOTARY PUBLIC

85-1150

NO. 85-

Supreme Court, U.S.
FILED
DEC 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY SPALLATO, Administrator of the Estate of SONJA M. SPALLATO, Deceased,

Plaintiff-Petitioner

v.

UNITED STATES OF AMERICA,

Defendant-Respondent

SUPPLEMENTAL APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 84-2996

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Attorneys for Petitioner

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Of Counsel

January 7, 1986

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY SPALLATO, Administrator of the Estate of SONJA M. SPALLATO, deceased,	80 C 1796
Plaintiff,	Chicago, Illinois September 24, 1984 4:45 p.m.
v.	
UNITED STATES OF AMERICA,	
Defendant.	

EXCERPT OF PROCEEDINGS BEFORE
HONORABLE JOHN F. GRADY

TRANSCRIPT ORDERED BY: MR. MICHAEL S. O'CONNELL

APPEARANCES:

For the plaintiff: MR. JOHN C. AMBROSE
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For the Government: HON DAN K. WEBB,
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219 S. Dearborn St.
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MR. MICHAEL S. O'CONNELL
MS. GAIL C. GINSBERG

COURT REPORTER: LAURA M. BRENNAN
219 S. Dearborn St.
Chicago, IL. 60604

* * * *

(The following proceedings were had in open court:)

THE COURT: I will give you my findings of fact and conclusions of law.

The plaintiff has the burden of proving that it is more probably true than not true that her death was caused in whole or in part by the swine flu injection she was administered. I will analyze the evidence which has been offered for and against that proposition.

First, there is no contention by the plaintiff or anyone else that the swine flu injection directly caused the plaintiff's death. So that theory is not involved in the case. In fact, it is clear from the evidence that the swine flu injection would not itself cause the death and that the only possible relationship between the swine flu injection and the death of the decedent would

be through some indirect series of events triggered by the swine flu injection.

The event that is contended for by plaintiff is Guillain-Barre Syndrome. Specifically, plaintiff contends that Mr. Spallato died as a result of having contracted Guillain-Barre Syndrome from the swine flu injection.

This brings me to my second finding. Mrs. Spallato may have had Guillain-Barre Syndrome. On the other hand, it seems to me at least equally probable that she did not have Guillain-Barre Syndrome. The difficulty is that the diagnosis of Guillain-Barre Syndrome is a difficult medical task. It is not something that can be casually arrived at on the basis of recollections of lay witnesses as to what the patient said.

Now, the evidence that I received from the parents of the decedent and from the husband of the decedent tends in some

degree to support the inference that the plaintiff had a progressive motor weakness of her lower and upper extremities and did not have the sensory deficit that would be more indicative of a diabetic neuropathy. On the other hand, the Court is confronted with the question as to how reliable these reports of these three witnesses are.

Mr. Spallato, when asked by Mr. Ambrose whether Mrs. Spallato complained of numbness, said, "Yes, she did," and then when Mr. Ambrose pursued the matter further said, "Well, no, she did not." It was apparent to me at that point that Mr. Spallato did not really know one way or the other whether his wife, with whom he lived on a day-to-day basis, was complaining of numbness or not. I do not attribute to him any knowing falsification; rather, the problem is in reconstructing what it was that a loved one

said about her condition some four years ago.

I believe the testimony of the parents was credible. I believe that the father and mother of Mrs. Spallato were unusually credible witnesses. But the problem is what significance to attach to their statements.

Now, we have Dr. Allen saying, on the one hand, that unquestionably their testimony, taken together with the other evidence, shows that Mrs. Spallato had Guillain-Barre Syndrome. On the other hand, we have the testimony of the experts called by the defendant that they are unable to make such a diagnosis on the basis of the same data. It is, of course, a medical question and a matter of expert opinion as between the testimony of Dr. Allen, on the one hand, and the testimony of the defense experts, on the other. I find the testimony of the defense experts to be more credible.

Dr. Allen is unquestionably a very well-qualified physician. I found him to be highly intelligent and articulate. On the other hand, I also found him to be deeply involved emotionally in the presentation of plaintiff's case here. For some reason he obviously regards himself as having a personal stake in the outcome of this case, if only from the standpoint of his professional interest in it. I do not mean to imply that he has any pecuniary interest in the matter, but his stance as one who, by his own statement, has the burden of proving something by 51%, his reference to the experts on the other side of the case in unflattering terms, and his use of pejorative descriptions of their testimony, frankly, prevents me from regarding him as a witness whose detachment from the controversy commends the credibility of his testimony.

No such involvement appears on the part of the defense expert witnesses.

Let me stop here just a moment and ask whether everybody is here on the other case.

Ms. Ginsberg, will you look out in the hall and see whether Mr. Solotorovsky and Mr. Samuels or Mr. Purdom and Mr. Samuels are out there. Thank you.

(Brief interruption.)

THE CLERK: 80 C 1796, Spallato v. United States.

THE COURT: All right, thank you, counsel, for your indulgence.

In short, while I think there is a very good possibility that Mrs. Spallato had Guillain-Barre syndrome, I am unable to conclude that there is better than a 50/50 chance that that was the case.

I turn now to finding of fact No. 3. There is no evidence in this record which persuades me that if Mrs. Spallato

did have Guillain-Barre Syndrome it was caused by the swine flu injection. Plaintiff has taken the position throughout the case that that point was conceded by the Government and apparently that it need not be proved in this case. On the other hand, Dr. Allen, I believe, did give the opinion that there was a connection, causal connection, between the shot and the Guillain-Barre. But for the same reasons, I am unable to rely upon Dr. Allen's testimony concerning the existence of Guillain-Barre Syndrome to begin with. I am unable to rely upon that testimony to conclude that it is more likely than not that if GBS was present it was caused by the swine flu injection. Again, there certainly is a good possibility that that would have been the case, but it is equally possible on the state of this record that it was not the case.

Fourthly, if Mrs. Spallato did have GBS, that GBS did not cause the death directly. Just as there is no evidence here and no contention here that the swine flu injection would standing alone cause a death, there is no contention that GBS standing alone would cause a death. Again, the GBS would be an intermediate element in the causal chain.

The causal chain alleged by plaintiff is multifaceted. It did not emerge until I asked some questions of Dr. Allen when he was recalled in rebuttal. There was some question, you will recall, at the conclusion of plaintiff's case as to whether or not Dr. Allen actually had testified to any causal relationship, direct or otherwise, between the GBS and Mrs. Spallato's death. To tie that question down, I questioned him specifically on what his theory was, and he gave us three possible theories.

The first was that GBS caused a cardiac arrhythmia from which Mrs. Spallato died. The second was that the GBS caused some autoimmune reaction which attacked the heart tissue and caused a myocarditis from which Mrs. Spallato died. The third possibility was that GBS caused some kind of antigen-antibody reaction or else some thrombus formation which led to a myocardial infarction, which caused the death.

Dr. Allen acknowledged that each of these possible mechanisms was speculative. His argument in favor of each of them was based largely on the fact that there has been no scientific study to exclude such a possibility. He emphasized the lack of any studies and the presence of data to bear out these theories.

On the other hand, Dr. Lesch testified that arrhythmia would not have

been the cause of death. Ventricular fibrillation would have been the immediate cause of death, and there is no evidence according to Dr. Lesch that GBS has ever caused ventricular fibrillation and, for that matter, even arrhythmia, as I understand it.

As to the possibility that the GBS led to a myocarditis, Dr. Lesch's comment was that the description of the decedent's death does not square with that kind of possible cause. The decedent's death in this case was sudden. Death from a myocarditis would be a gradual process. As to the possibility that the GBS caused a myocardial infarction, Dr. Lesch said that there is no medical evidence to support the proposition that GBS would cause a myocardial infarction.

Dr. Hurst, who testified in deposition, I found to be a credible

witness, and while he did not address himself specifically to the question of the relationship, if any, between GBS and heart trouble, testified that there is no medical evidence to support a causal connection between a swine flu injection and any kind of heart problem. Well, surely Dr. Hurst was well aware of the alleged relationship between the swine flu injection and GBS and undoubtedly would intend to include in his testimony the kind of mechanisms suggested by Dr. Allen as not being supported by any medical data.

In other words, I interpret Dr. Hurst's testimony to mean that there is no evidence that a swine flu injection can cause GBS, which in turn causes myocarditis or an infarct or any other heart problem that might result in death.

What then did cause Mrs. Spallato's death if it was not the swine flu injection and Guillain-Barre Syndrome?

She had myocarditis, and she had a myocardial infarct. The evidence offered by Dr. Ganote and Dr. Lesch was that the myocarditis was secondary to the myocardial infarct. I find that testimony to be far more probable than the reverse proposition advanced by Dr. Allen. The decedent did not die from myocarditis. She died from a myocardial infarct, and there was some myocarditis associated with that infarct but secondary to and caused by the infarct.

What caused the infarct?

Dr. Allen, while not hesitating to attribute Mrs. Spallato's death to the swine flu injection and GBS, apparently believes that there is no possibility that her death was in any way related to her longstanding diabetes. He discounted diabetes as having any significant role in this case. He regarded Mrs. Spallato as being under good control for her

diabetes, and, indeed, that was the lay testimony of Mr. Spallato. However, it is uncontradicted that Mrs. Spallato had kidney damage such that 80 to 90 per cent of her kidney function was destroyed. This is far from indicating diabetes that was under good control.

Moreover, she had previously sustained a myocardial infarct that antedated by many months the swine flu injection, and the cause of which is unknown but which certainly could have been related to her diabetes.

There was an eye problem that indicated advanced diabetic damage.

Mrs. Spallato was testing her urine rather than her blood to determine what her blood sugar was. I believe the evidence indicates that that is a relatively primative way of testing the level of blood sugar. Blood testing is a far more precise way of measuring, and we

have no evidence that I know of as to what Mrs. Spallato's blood level was during the period prior to her death. What we do know is that when she entered the hospital she had a very high blood sugar reading, and her diabetes was deemed at that time to be out of control.

Therefore, to discount diabetes as a cause of death when it is clear that Mrs. Spallato had a serious diabetic condition and when it is known that diabetes and heart trouble of the kind which was the immediate cause of her death are closely related on a causal basis seems to me to be scientifically unsupportable.

I find on what I regard as the overwhelming weight of the evidence that the cause of Mrs. Spallato's death was a myocardial infarct, which was a complication of her diabetes and was unrelated to the swine flu injection.

Accordingly, I find the issues in favor of the defendant and against the plaintiff and enter judgment in favor of the defendant.

We will take a five-minute recess before the next case.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)